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# THE SOLUTION TO NHL COLLECTIVE BARGAINING DISPUTES: MANDATORY BINDING ARBITRATION

Braden Shaw\*

## INTRODUCTION

Collective bargaining disputes between players and owners continue to impede upon the operation and development of the National Hockey League (“NHL” or “the League”).<sup>1</sup> Such disputes are lengthy, unnecessary, and prevent the League from generating billions of dollars in revenue.<sup>2</sup> The League has experienced three major work stoppages within the past eighteen years,<sup>3</sup> including the cancellation of the entire 2004–2005 season.<sup>4</sup>

The NHL’s unprecedented number of labor disputes demonstrates that the NHL’s current collective bargaining negotiation process is unworkable. While federal mediators have attempted to help resolve NHL conflicts in the past,<sup>5</sup> their potential impact diminishes if the representatives of the players and owners are unwilling to cooperate with one another.<sup>6</sup> Therefore, it is time for the NHL to integrate

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1. Alexandra Baumann, *Play Ball: What Can Be Done to Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights On*, 32 J. NAT’L ASS’N ADMIN. L. JUDICIARY 251, 280–85 (2012) (discussing various NHL work stoppages from 1992 through 2005); Alexander A. Jeglic, *Can the New Collective Bargaining Agreement Save the NHL?*, 23 ENT. & SPORTS L. 1, 23–24 (2005) (discussing the 2004–2005 NHL Lockout and details of the changes that were made to the Collective Bargaining Agreement that was put into place in 2005); James Mirtle, *Measuring the NHL-NHLPA Divide: Oh, About \$1-Billion*, GLOBE AND MAIL (Sep. 13, 2012), <http://www.theglobeandmail.com/sports/hockey/globe-on-hockey/measuring-the-nhl-nhlpa-divide-oh-about-1-billion/article4541634/> (discussing the hockey-related revenue division proposals of the players and the owners early in the 2012 collective bargaining negotiations).

2. See Baumann, *supra* note 1; see also Mirtle, *supra* note 1 (discussing how disagreements over player contracts, revenue division between players and owners, and player salary constraints have impacted the operation of the NHL).

3. See Baumann, *supra* note 1; see also David Strehle, *As 2012 NHL Lockout Nears One Month Mark, Concerns Grow*, SB NATION (Oct. 11, 2012, 10:41 AM), <http://www.sbnation.com/2012/10/11/3487060/nhl-lockout-2012-nhlpa-posturing> (discussing numerous issues that may complicate the 2012 lockout and the future of the NHL).

4. See Jeglic, *supra* note 1.

5. See Joe LaPointe, *Hockey; No Promises, but Federal Mediator Will Try to Settle N.H.L. Strike*, N.Y. TIMES (Apr. 9, 1992), available at <http://www.nytimes.com/1992/04/09/sports/hockey-no-promises-but-federal-mediator-will-try-to-settle-nhl-strike.html>.

6. *Id.*

mandatory binding arbitration into its collective bargaining process. The use of mandatory binding arbitration in employment contracts has grown during recent decades.<sup>7</sup> Given the severity and frequency of disputes between players and owners,<sup>8</sup> mandatory binding arbitration is the only possible solution to resolving the conflicts in the NHL.

The NHL would benefit from a mandatory binding arbitration provision in a variety of ways. If the NHL Collective Bargaining Agreement called for mandatory binding arbitration, the negotiation process would become more efficient by establishing a deadline for a new deal to be reached. This procedure would provide an incentive for the parties to cooperate with one another, so as to not leave decisions on key issues to a third-party arbitrator. In addition, the potential involvement of an arbitrator would severely mitigate the power that the representatives of the players and owners have over the process. Ultimately, mandatory binding arbitration would ensure that an expiring collective bargaining agreement would not unnecessarily result in the cancellation of NHL games and prevent the League from losing billions of dollars in revenue.<sup>9</sup> In addition, the League would no longer continue to tarnish its relationship with the players, fans, sponsors, and local businesses that thrive on the existence of the NHL.

This Comment argues that the NHL must incorporate mandatory binding arbitration into its collective bargaining process. Part I discusses the NHL's business structure, the collective bargaining process, and the League's recent collective bargaining disputes. Part I then discusses current NHL dispute resolution mechanisms and introduces non-binding and binding arbitration. Part II argues that the NHL's current collective bargaining process is ineffective. Part II also analyzes how mandatory binding arbitration solves collective bargaining problems. Part III argues that NHL players and owners must accept mandatory binding arbitration by discussing the dramatic effects future lockouts could have on the players, owners, third parties, and the NHL as a whole. Part IV provides a brief conclusion.

## I. BACKGROUND

This Section begins by providing background on the overall business structure of the NHL. This Section then introduces the NHL collective bargaining process and discusses the League's recent collective

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7. Ashley M. Sergeant, *The Corporation's New Lethal Weapon: Mandatory Binding Arbitration Clauses*, 57 S.D. L. REV. 149, 155–57 (2012) (discussing the Supreme Court's use and expansion of mandatory binding arbitration clauses in employment contracts).

8. See Baumann, *supra* note 1.

9. See Baumann, *supra* note 1; see also Mirtle, *supra* note 1.

bargaining disputes. This Section then discusses current dispute resolution procedures in the NHL and concludes by introducing the concept of arbitration.

### *A. Structure of the NHL*

#### *1. The NHL and the Owners*

Evaluating labor disputes in the NHL begins with understanding the business structure of the League. The NHL operates as a non-profit, unincorporated joint venture.<sup>10</sup> The NHL was established in 1917<sup>11</sup> and has generated billions of dollars of revenue, which is split between the players and the team owners.<sup>12</sup> All thirty NHL teams operate as separate business entities.<sup>13</sup> Since the creation of the NHL, the League has developed into an industry that generates billions of dollars of revenue on an annual basis.<sup>14</sup>

Gary Bettman became the first NHL Commissioner in 1993.<sup>15</sup> Bettman's main responsibility is to "act in the best interest of the League as a whole,"<sup>16</sup> and his authorities can be analogized to the powers of a chief executive officer of any other business.<sup>17</sup> Bettman has the power to discipline players and interpret provisions in the NHL's constitution, rules, and by-laws.<sup>18</sup> Most importantly for this Comment, Bettman is responsible for acting as an unbiased arbitrator in resolving disputes between the players and owners in relation to the Collective Bargaining Agreement.<sup>19</sup> In addition, if Bettman receives

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10. Brian Ward, *The National Hockey League's Collective Bargaining Agreement: Its Inadequacies in Dealing With League Internationalization*, 23 SUFFOLK TRANSNAT'L L. REV. 747, 748-49 (2000) (discussing the NHL's business entity, employment relationships, and the collective bargaining process).

11. See Jeglic, *supra* note 1.

12. See Mirtle, *supra* note 1.

13. See Ward, *supra* note 10.

14. Mathieu Fournier & Dominic Roux, *Labor Relations in the National Hockey League: A Model of Transnational Collective Bargaining?*, 20 MARQ. SPORTS L. REV. 147, 148 (2009) (discussing how the players and owners compete for a share of the generated revenue).

15. Thomas J. Arkell, *National Hockey League Jurisprudence: Past, Present, and Future*, 8 SETON HALL J. SPORT L. 135, 136 (1998) (discussing Gary Bettman's experience prior to becoming the commissioner of the NHL).

16. Richard J. Cohen & Joseph M. Hanna, *The Rangers' Gloves Are Off in a Digital Tussle With the NHL*, 25 ENT. & SPORTS L. 18, 18 (2008) (summarizing Bettman's authorities and responsibilities).

17. *Id.*

18. *Id.*

19. Arkell, *supra* note 15, at 136 (discussing how the players argue Bettman's role as an unbiased arbitrator is not possible, while the NHL argues his role is necessary in order to resolve disputes and allow the League to efficiently operate). The NHL won the argument in *Nat'l Hockey League Players' Ass'n v. Bettman*, 1994 WL 738835 (S.D. N.Y. 1994). The Plaintiffs were two NHL hockey players who wanted to void two decisions made by Bettman that concerned

approval by at least eight of the thirty owners, Bettman has the power to reject any National Hockey League Players' Association (NHLPA) counter-proposal.<sup>20</sup> Further, Bettman helps the owners develop their collective bargaining strategy.<sup>21</sup>

## 2. *The NHLPA and the Players*

NHL players formed their union in 1957.<sup>22</sup> As the popularity of the game and revenues increased, players saw an opportunity to make more money.<sup>23</sup> In the late 1950s, NHL owners entered into a television contract with CBS, which did not allocate any of the profits to the players.<sup>24</sup> Unsurprisingly, the players were unhappy and wanted to protest the deal.<sup>25</sup> Therefore, the players decided to form their union, known as the NHLPA.<sup>26</sup>

The purpose of the NHLPA is to negotiate and enforce fair terms of employment on behalf of the players.<sup>27</sup> Each NHL team elects a Club Player Representative who serves as a voting member on the NHLPA Executive Board.<sup>28</sup> The board also consists of an Executive Director who is a non-voting member responsible for managing the NHLPA's daily affairs.<sup>29</sup>

In December 2010, Donald Fehr became the Executive Director of the NHLPA.<sup>30</sup> Fehr assumed the position after more than twenty years as the Executive Director of the Major League Baseball Players'

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contract offers extended to them by the San Jose Sharks. *Id.* at 1. The Plaintiffs argued the matter should have been resolved by an independent arbitrator rather than Bettman. *Id.* However, the Court found the Collective Bargaining Agreement specifically allowed Bettman to resolve such disputes, and there was no reason to believe that Bettman's decisions were biased. *Id.* at 11–32.

20. See Christopher Botta, *NHL Lockout: Gary Bettman is Going Nowhere - No Matter What*, SPORTSBUSINESS JOURNAL SPORTING NEWS (Oct. 29, 2012, 11:01 AM), <http://aol.sportingnews.com/nhl/story/2012-10-29/nhl-lockout-news-2012-gary-bettman-criticism-hockey-strike-david-stern-retire> (discussing the challenges Bettman faces in leading the collective interests of all thirty NHL owners).

21. *Id.*

22. Jordan I. Kobritz & Jeffrey F. Levine, *Don Fehr Leads the NHLPA: Does the NHL Have Anything to Fear?*, 11 V.A. SPORTS & ENT. L.J. 178, 178–80 (2011) (discussing the history and formation of the NHLPA).

23. Jeglic, *supra* note 1, at 23.

24. Kobritz, *supra* note 22, at 180.

25. *Id.*

26. *Id.* at 180–81.

27. INSIDE NHLPA, available at <http://www.nhlpa.com/inside-nhlpa> (last visited Nov. 15, 2012).

28. *Id.*

29. INSIDE NHLPA/ORGANIZATION/EXECUTIVE BOARD MEMBERS, available at <http://www.nhlpa.com/inside-nhlpa/organization/executive-board> (last visited Nov. 15, 2012).

30. Kobritz, *supra* note 22, at 179.

Association.<sup>31</sup> Fehr first became involved with the NHLPA in 2009 as an unpaid consultant in order to help the NHLPA amend its constitution.<sup>32</sup> Fehr is a highly regarded figure in sports law<sup>33</sup> and offers much needed stability to the NHLPA, which had gone through four different executive directors in the five years before Fehr assumed the position.<sup>34</sup>

### B. Collective Bargaining Agreement Process

The NHL Collective Bargaining Agreement is a written instrument that controls the relationships between NHL players, owners, and teams.<sup>35</sup> Specifically, the Collective Bargaining Agreement contains provisions governing rules, arbitration and grievance procedures, along with minimum player salaries and working conditions.<sup>36</sup> The NHL's role in the collective bargaining process is to represent the collective interests of all thirty NHL franchises and owners.<sup>37</sup>

Once an NHL collective bargaining agreement expires, the negotiation of a new collective bargaining agreement typically starts with the owners meeting with the NHLPA representatives.<sup>38</sup> The process begins with the union representative presenting the employer with a list of issues and proposals that must be discussed.<sup>39</sup> Such issues in the NHL have previously concerned revenue division between players and owners, the structure of player contracts, and player salary limits.<sup>40</sup> The NHL may then accept the union's proposals, offer counter-proposals, or simply do nothing.<sup>41</sup> Both sides will continue to meet and exchange proposals in order to come to an agreement.<sup>42</sup> The law

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31. *Id.*

32. See Jeff Z. Klein, *The N.H.L. Players Union Votes to Appoint Fehr as Its Leader*, N.Y. TIMES (Dec. 18, 2010), <http://www.nytimes.com/2010/12/19/sports/hockey/19fehr.html> (discussing how the players have given Fehr credit for uniting the players and bringing much-needed order to the NHLPA).

33. Kobritz, *supra* note 22, at 206–08 (discussing Donald Fehr's past involvement with the Major League Baseball Players' Association [MLBPA] and how Fehr came to be the executive director of the NHLPA).

34. *Id.* at 179.

35. See COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION, available at [http://cdn.agilitycms.com/nhlpacom/PDF/NHL\\_NHLPA\\_2013\\_CBA.pdf](http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf).

36. *Id.*

37. See Mirtle, *supra* note 1.

38. See Section 5: *Collective Bargaining*, in *Labour: Markets, Laws, and Unions*, CANADIAN FOUNDATION FOR ECONOMIC EDUCATION, available at <http://www.cfee.org/en/pdf/labourstudent5.pdf>.

39. *Id.*

40. See Baumann, *supra* note 1; see also Mirtle, *supra* note 1.

41. See Section 5: *Collective Bargaining*, in *Labour: Markets, Laws, and Unions*, *supra* note 38.

42. *Id.*

is aimed at being as deferential as possible to the two sides, and only requires that the parties negotiate in good faith.<sup>43</sup>

### C. *Recent Collective Bargaining Disputes in the NHL*

As the NHL's hockey-related revenue has steadily increased over the past couple of decades,<sup>44</sup> conflicts between the NHL and the NHLPA have dramatically increased as well.<sup>45</sup> Since Gary Bettman became the commissioner of the NHL in 1993, the League has experienced three significant labor disputes, all of which have led to the cancellation of games.<sup>46</sup>

#### 1. *1994–1995 Lockout*

In 1994 the NHL experienced what was, at the time, considered to be a lengthy lockout. The 1993–1994 season was played without a collective bargaining agreement, and Gary Bettman insisted that the 1994–1995 season would not begin without a new collective bargaining agreement.<sup>47</sup> On the day the 1994–1995 season was set to begin, the owners locked out the players.<sup>48</sup> The primary issue was the owners' insistence on implementing salary caps that would limit how much teams were allowed to pay their players.<sup>49</sup> Owners felt the salary cap system would help equalize costs throughout the league, but the players preferred the implementation of a revenue sharing scheme.<sup>50</sup>

The NHL did not use a mediator to help with negotiations, and the lockout lasted 104 days.<sup>51</sup> Only forty-eight games, as opposed to the typically schedule of eighty-two games, were played that season.<sup>52</sup> In addition, the Collective Bargaining Agreement that was put in place after months of negotiations between the players and owners failed to adequately resolve the salary cap issue, which led to the infamous lockout during the 2004–2005 season.<sup>53</sup>

43. *Id.*

44. See Jeglic, *supra* note 1.

45. *Id.*

46. *Id.*

47. Baumann, *supra* note 1, at 281.

48. *Id.*

49. See Jeglic, *supra* note 1.

50. *Id.*

51. Baumann, *supra* note 1, at 282.

52. Daniel Gregory Horowitz, *The Effect of Strikes and Lockouts on the Strength of Professional Sports Leagues* (2011) (unpublished undergraduate thesis, The Ohio State University), available at [http://kb.osu.edu/dspace/bitstream/handle/1811/48847/The\\_Effect\\_of\\_Strikes\\_and\\_Lockouts\\_on\\_the\\_Strength\\_of\\_Professional\\_Sports\\_Leagues.pdf?sequence=1](http://kb.osu.edu/dspace/bitstream/handle/1811/48847/The_Effect_of_Strikes_and_Lockouts_on_the_Strength_of_Professional_Sports_Leagues.pdf?sequence=1).

53. Baumann, *supra* note 1, at 282.

## 2. 2004–2005 Lockout

The 2004–2005 labor dispute resulted in the cancellation of the entire NHL season.<sup>54</sup> In 2003, with eleven and one-half months remaining on the then-current Collective Bargaining Agreement, the NHL and NHLPA attempted to negotiate a new agreement.<sup>55</sup> The owners insisted on implementing a thirty-one million dollar team salary cap into the Collective Bargaining Agreement in order to control player salaries.<sup>56</sup> In October of 2003, the players offered a slight reduction in their salaries, but the owners sought larger reductions.<sup>57</sup> With no process of arbitration included in the Collective Bargaining Agreement,<sup>58</sup> the parties had no incentive to negotiate with one another in good faith.<sup>59</sup>

The players and owners continued to resist one another, and on September 15, 2004, the owners locked out the players.<sup>60</sup> Five months later, despite ongoing negotiations and the use of federal mediators, the NHL cancelled the entire 2004–2005 season.<sup>61</sup> This was the first time a labor dispute forced a North American sport to cancel an entire season.<sup>62</sup> The players and owners did not agree to a new collective bargaining agreement until July 2005.<sup>63</sup>

The adjustments to the 2005 Collective Bargaining Agreement appear to have had a positive financial effect on the League. In the three previous years before the lockout, the NHL had an overall negative operating income each season, and more than half of the NHL franchises had a negative operating income.<sup>64</sup> However, due to salary cap adjustments, rule changes, and the introduction of revenue sharing after the lockout, only eight teams had a negative operating income and the NHL as a whole had a positive operating income of \$125,100,000.<sup>65</sup> Despite the positive financial gains the NHL exper-

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54. See Horowitz, *supra* note 52.

55. Blake Murphy, *A Look Back at the NHL Lockout*, available at <http://blakemurphy.com/2008/04/12/a-look-back-at-the-nhl-lockout/>.

56. Baumann, *supra* note 1, at 283.

57. *Id.*

58. See COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION, *supra* note 35.

59. See Murphy, *supra* note 55.

60. Baumann, *supra* note 1, at 283.

61. *Id.*

62. Stephen M. Yoost, *The National Hockey League and Salary Arbitration: Time For a Line Change*, 21 OHIO ST. J. ON DISP. RESOL. 485, 485 (2006) (discussing changes that were made to the 2004–2005 Collective Bargaining Agreement as a result of the lockout, as well as arguing for the implementation of future changes in order to prevent future lockouts).

63. Baumann, *supra* note 1, at 284.

64. *Id.*

65. *Id.*



enced after the implementation of the 2005 Collective Bargaining Agreement, the League lost an estimated \$2 billion in revenue and the players lost roughly \$1 billion in salaries as a result of the entire season being cancelled.<sup>66</sup>

### 3. 2012–2013 Lockout

Just eight years later, the NHL endured another lockout during the 2012–2013 season.<sup>67</sup> One main issue surrounding the 2012–2013 lockout was determining how the players and owners would share hockey-related revenue.<sup>68</sup> The previous Collective Bargaining Agreement gave the players fifty-seven percent of hockey-related revenues, while the owners received the remaining forty-three percent.<sup>69</sup> The League had experienced annual revenue growth of 7.1 percent after the 2004–2005 lockout, and the owners insisted on receiving a higher percentage of that revenue.<sup>70</sup> Mediator Scot Beckenbaugh became involved in the process in December of 2012.<sup>71</sup> Beckenbaugh received praise in his role of bringing the parties together<sup>72</sup> and in January 2013, the NHL and the NHLPA reached a new collective bargaining agreement.<sup>73</sup>

Shortly after the parties reached an agreement, the NHL announced that a forty-eight game season would be played.<sup>74</sup> Each team held a brief one-week training camp before beginning a season in which each team played an average of three and one-half games per week.<sup>75</sup> As a result of the lockout, a total of 625 games were can-

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66. Paul D. Staudohar, *The Hockey Lockout of 2004–05*, MONTHLY LABOR REVIEW, BUREAU OF LABOR STATISTICS (Dec. 2005), available at <http://www.bls.gov/opub/mlr/2005/12/art3full.pdf>.

67. Katie Strang, *NHL, NHLPA Make No Progress*, ESPN (Oct. 2, 2012, 7:55 PM), [http://espn.go.com/nhl/story/\\_id/8452874/latest-meeting-not-overly-encouraging](http://espn.go.com/nhl/story/_id/8452874/latest-meeting-not-overly-encouraging) (citing the “lack of common ground” as the reason the two parties had not yet been able to negotiate a new collective bargaining agreement).

68. See Mirtle, *supra* note 1.

69. *Id.*

70. *Id.*

71. Pat Leonard, *Mediation With Scott Beckenbaugh Gets NHL, Union on Track*, DAILY NEWS (Jan. 6, 2013), available at <http://www.nydailynews.com/blogs/rangers/2013/01/mediation-with-scot-beckenbaugh-gets-nhl-union-on-track-bill-daly-says-parties-are-t>.

72. *Id.* (quoting Bill Daly: “[t]he mediator has obviously done a great job. Slow process, but at least the parties are talking and working through issues.”).

73. Ira Podell & Ronald Blum, *NHL Lockout: Players’ Union, League Reach Deal to Restart Hockey Season*, HUFFINGTON POST (Jan. 6, 2012), [http://www.huffingtonpost.com/2013/01/06/nhl-lockout-deal-reached\\_n\\_2419552.html](http://www.huffingtonpost.com/2013/01/06/nhl-lockout-deal-reached_n_2419552.html).

74. Bloomberg, *NHL 48-Game Season Starts Jan. 19 After Players Accept Contract*, TOLEDO BLADE (Jan. 14, 2013), <http://www.toledoblade.com/sports/2013/01/13/NHL-48-game-season-starts-Jan-19-after-players-accept-contract.html>.

75. *Id.*

celled.<sup>76</sup> The lost games cost the League an estimated one billion dollars in revenues.<sup>77</sup>

#### *D. Current NHL Dispute Resolution Procedures*

The NHL currently does not use a formal dispute resolution process in order to resolve collective bargaining disputes. However, the NHL does have different dispute resolution mechanisms in order to resolve other conflicts. Salary arbitration and mediation services are two prime examples.

##### *1. Salary Arbitration*

While the current NHL Collective Bargaining Agreement does not call for mandatory binding arbitration, it does use an arbitration process as a means of resolving player salary disputes.<sup>78</sup> Under the terms of the Collective Bargaining Agreement, salary arbitration is used to resolve disputes between players who are considered to be restricted free agents and the NHL franchise the respective player plays for.<sup>79</sup> Restricted free agents differ from unrestricted free agents in that when their contract ends, their respective team has the right to match any other contract offer the player receives from another team.<sup>80</sup> This allows the team to retain the player and the team is committed to honor the contract originally offered by the other team.<sup>81</sup> There are various goals restricted free agents attempt to accomplish through salary arbitration, the most common being an increase in salary.<sup>82</sup> Once salary arbitration is initiated, a salary arbitrator resolves the dispute.<sup>83</sup>

##### *2. Mediation Services*

As briefly mentioned above, previous NHL lockouts have included mediation services.<sup>84</sup> Professional sports currently fall under the jurisdiction of the National Labor Relations Board (NLRB) and the Federal Mediation and Conciliation Service (FMCS).<sup>85</sup> For example,

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76. *Id.*

77. See Podell, *supra* note 73.

78. John B. Sprenzel, *Salary Arbitration in the National Hockey League: Taking the Next Step With Online Dispute Resolution*, 62 DISP. RESOL. J. 64, 67 (2007) (discussing the NHL's salary arbitration procedure).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Baumann, *supra* note 1, at 280.

85. *Id.* at 296.

during a player strike that occurred during the 1992 NHL season,<sup>86</sup> federal mediator John Martin was assigned to help the parties come to an agreement.<sup>87</sup>

In order for either one of these services to become involved, one of the two parties must either file a claim alleging bad faith on the part of the other side, or request a mediator's involvement.<sup>88</sup> Typically, claims involving bad faith are deemed to be moot or are dropped before a ruling is made.<sup>89</sup> As a result, any third party involvement usually derives from one party requesting the use of a mediator.<sup>90</sup> While the mediation service can attempt to facilitate the negotiation process between the parties, the service has no authority to implement binding arbitration.<sup>91</sup>

Since the NHL is willing to use dispute resolution processes in certain disputes, it is not unrealistic to suggest the League would consider implementing a formal dispute resolution mechanism into the League's collective bargaining process. While the NHL's current dispute resolution procedures call for the involvement of third parties in order to help settle certain disputes, the League must take the next step in order to permanently resolve ongoing collective bargaining conflicts, which have severe impacts not only on the NHL, but businesses and employees that rely on the existence of the league. Implementing an arbitration process is the only adequate solution.

### E. Arbitration

Arbitration is "a method of dispute resolution in which the parties submit a dispute to an impartial [person or] persons who have been selected by the parties for a final and binding decision."<sup>92</sup> Generally, arbitration is an alternative dispute resolution mechanism used to avoid taking a dispute to court.<sup>93</sup> There are two types of arbitration: non-binding and binding arbitration.

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86. *Id.* at 280 (discussing how before the 1991 season, the CBA expired without a new CBA to take its place). The players and owners decided to begin the season and attempt to negotiate a new CBA while the season was underway. *Id.* In April, the two sides still had not come to an agreement, and the players went on strike. *Id.* After the NHLPA rejected what the owners declared was a "final offer," a mediator became involved in the process. *Id.* Ten days after the mediator became involved, the strike ended and the rest of the season was preserved. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Baumann, *supra* note 1, at 280.

91. *Id.*

92. Sergeant, *supra* note 7, at 149.

93. *Id.* at 151.

### 1. *Non-binding Arbitration*

One form of arbitration is known as non-binding arbitration.<sup>94</sup> Non-binding arbitration differs from binding arbitration only in that the parties may choose to bypass the arbitrator's decision,<sup>95</sup> rather than being automatically bound.<sup>96</sup> Although the parties are not forced to abide by the award of the arbitrator, those in favor of non-binding arbitration view it as a way to facilitate the negotiation process.<sup>97</sup> An arbitrator's decision may indicate how a judge might resolve the dispute, and that information could help the parties reach a settlement in the future.<sup>98</sup> The major downside is if the parties are unable to settle after receiving the arbitrator's award, the non-binding arbitration procedure could have little, if any, effect.<sup>99</sup>

### 2. *Binding Arbitration*

Binding arbitration is "a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding."<sup>100</sup> Those in favor of mandatory binding arbitration clauses feel the provision allows procedural flexibility by allowing the parties to control how quickly the process is handled.<sup>101</sup> In addition, the arbitrator could potentially have a more specific background regarding the issues in dispute than a judge would.<sup>102</sup> Arbitration also offers the parties the option of keeping the process private, as opposed to a public trial, in which the public has the ability to follow and monitor the proceedings.<sup>103</sup> The process of arbitration may also shield the parties' views from the public, allowing the parties to take positions that they would otherwise be adverse from taking, thus potentially facilitating the negotiating process.<sup>104</sup>

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94. Stephen C. Bennett, *Non-Binding Arbitration: An Introduction*, 61 DISP. RESOL. J. 22, 24-25 (2006) (discussing the positives and negatives to non-binding arbitration as well as the effects an award may have on the parties).

95. Charles B. Carter, *Non-Binding Arbitration: Curse or Blessing?*, 28 NO. 3 TRIAL ADVOC. Q. 23, 24 (2009) (discussing how a non-binding arbitration award entered at the conclusion of a hearing "shall be final" unless a party requests a trial within a given time frame).

96. Bennett, *supra* note 94, at 24.

97. *Id.*

98. *Id.*

99. *Id.*

100. Yoost, *supra* note 62, at 498.

101. Sergeant, *supra* note 7, at 155-57.

102. *Id.*

103. Joshua M. Wickard, *Mandatory Arbitration in Real Estate and Related Transactions*, 45 ADVOC. 18, 18 (2002).

104. Courtney Lofti, *Doping, Athletes, and Arbitration*, 2006 DEN. U. SPORTS & ENT. L.J. 1, 10 (2006).

Those opposed to mandatory binding arbitration clauses feel that they deprive the parties of their ability to have the dispute heard in court.<sup>105</sup> While proponents argue that binding arbitration is less expensive than litigation, many opponents feel that the process is potentially more expensive because of the fees that must be paid in order to begin the arbitration procedure and travel expenses the parties will inevitably incur.<sup>106</sup>

The NHL's continuous lockouts show the League's collective bargaining process is unworkable. Since Gary Bettman became commissioner, the League has endured three collective bargaining disputes that have severely impacted the operation of the NHL.<sup>107</sup> The League's use of dispute resolution mechanisms in other contexts suggests the League may be willing to accept a change that would prevent future lockouts from continuing to occur. Implementing mandatory binding arbitration into the collective bargaining process is the answer.

## II. ANALYSIS

As evidenced by the NHL's numerous lockouts, the League's current collective bargaining process must be amended. This Section argues that the collective bargaining process does not work because Gary Bettman and Donald Fehr are unable to effectively work together in order to represent the players' and owners' collective interests. This Section proceeds by arguing that the players and owners must implement mandatory binding arbitration in order to regain control of the League by mitigating the roles of Bettman and Fehr. This Section then explains how implementing mandatory binding arbitration would mitigate the roles of Bettman and Fehr, and prevent future lockouts. This Section then concludes by offering a proposal for how the mandatory binding arbitration process could work procedurally.

### A. *Inability of Bettman and Fehr to Effectively Negotiate*

The NHL and NHLPA, as evidenced by all three of the recent lockouts, are unable to cooperate with one another and efficiently resolve collective bargaining disputes. While Bettman has been the NHL's representative for all three of the lockouts, the recent addition of Fehr as the director of the NHLPA has only further complicated the process. The parties' continuous inability to work with one another is

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105. Sergeant, *supra* note 7, at 164.

106. *Id.* at 165.

107. See Jeglic, *supra* note 1.

best evidenced by the 2012–2013 lockout. Any momentum gained in the initial stages of the 2012–2013 lockout’s collective bargaining process was impeded by insignificant counter-proposals<sup>108</sup> and inexcusable delays in negotiation sessions.<sup>109</sup>

After the owners’ submitted a proposal to the NHLPA on October 16, 2012, the two parties had a face-to-face meeting where the NHLPA presented three-counter proposals, which the owners deemed to be far from acceptable.<sup>110</sup> After the meeting, Gary Bettman stated it’s “clear we’re not speaking the same language . . . we’re nowhere close to what we proposed . . . I don’t know what the next step is . . . I am to say the least thoroughly disappointed.”<sup>111</sup> In November 2012, after spending nearly a week in New York City negotiating, NHL Deputy Commissioner Bill Daly stated that the parties made “no progress.”<sup>112</sup> In addition, Donald Fehr stated, “I don’t see a path to an agreement here.”<sup>113</sup>

The inability of Bettman and Fehr to work with one another is obvious and extremely problematic. Unless the collective bargaining process is amended in a way that would force the parties to take a softer stance on their demands and negotiate in good faith, they will continue to be at odds in future negotiations for two reasons: 1) the players refuse to work with Gary Bettman and 2) the owners are frustrated with Donald Fehr’s involvement as the Executive Director of the NHLPA.

### 1. Gary Bettman

The players’ hostility toward Bettman is largely a result of Bettman’s history of locking out the players. The players’ feelings towards Bettman were recently articulated by NHL player Henrik Zet-

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108. Bruce McCurdy, *Double Whammy: Parties “Not Speaking the Same Language”, Be it NHL CBA Talks or Downtown Arena Negotiations*, EDMONTON JOURNAL (Oct. 18, 2012), available at <http://blogs.edmontonjournal.com/2012/10/18/impasse-the-watchword-at-league-and-local-levels/>.

109. Ira Podell, *NHL lockout 2012: League, Union Still Talking But Not Negotiating*, WASH. POST (Oct. 22, 2012), available at <http://www.washingtontimes.com/news/2012/oct/22/nhl-lockout-2012-league-union-still-talking-not-ne/>.

110. See John Vogl, *Union Counteroffers Go Nowhere Fast*, BUFFALO NEWS (Oct. 18, 2012), available at <http://www.buffalonews.com/apps/pbcs.dll/article?AID=/20121018/SPORTS/121019110/1004>.

111. *Id.*

112. James O’Brien, *Daly Admits “No Progress” Was Made on Sunday*, NBC SPORTS: PROHOCKEYTALK (Nov. 11, 2012, 5:20 PM), <http://prohockeytalk.nbcsports.com/2012/11/11/daly-admits-no-progress-was-made-on-sunday/>.

113. Joe Yerdon, *Fehr on Contracting Issues: “I Don’t See a Path to an Agreement Here”*, NBC SPORTS: PROHOCKEYTALK (Nov. 11, 2012, 4:19 PM), <http://prohockeytalk.nbcsports.com/2012/11/11/fehr-on-contract-issues-i-dont-see-a-path-to-an-agreement-here/>.

terberg who stated that “[i]t’s the third lockout in I don’t know how many years now. Ever since Bettman came into the League offices, that’s been his way to handle stuff . . . we’re ready to have a fight here.”<sup>114</sup> In addition, NHL veteran Jason Chimera stated “I don’t trust Gary Bettman right now.”<sup>115</sup>

One NHL columnist suggests that the players may be more receptive to the negotiation process if Bettman was no longer involved.<sup>116</sup> In September, when the scheduling of an eighty-two game season was still possible, the columnist said the chance of there being an NHL season in 2012–2013 was merely fifteen percent<sup>117</sup> and added that “the players in the NHL are sick and tired of Gary Bettman, and they will sacrifice their greater financial good to drive this man out of the game.”<sup>118</sup> Allan Walsh, who is the agent of many NHL players, stated “Bettman has become such a toxic commodity for the game, it’s untenable after three lockouts that he be the person to grow revenues in partnership with the players going forward.”<sup>119</sup> NHL superstar Alexander Ovechkin is so upset with Gary Bettman that he has threatened to finish his professional hockey career in Russia.<sup>120</sup> A frustrated Ovechkin added, “Bettman decided to throw dust in our eyes because [the] media isn’t talking about him very well lately.”<sup>121</sup>

Despite Bettman’s lack of popularity with the players, driving Bettman out of the game is not a viable solution. The owners are happy with Bettman, and continue to give him five-year contract ex-

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114. Helene St. James, *Red Wings’ Henrik Zetterberg: Players Ready for a ‘Fight’ With Gary Bettman*, *NHL*, DETROIT FREE PRESS (Sep. 14, 2012), available at <http://www.freep.com/article/20120914/SPORTS05/120914058/detroit-red-wings-henrik-zetterberg-lockout>; see also Jason Brough, *Players Haven’t Been Instructed to “Demonize” Bettman, Says NHLPA*, *NBC SPORTS: PROHOCKEYTALK* (Nov. 14, 2012, 4:33 PM), <http://prohockeytalk.nbcsports.com/2012/11/14/players-havent-been-instructed-to-demonize-bettman-says-nhlpa/> (quoting other NHL players’ statements regarding their feelings towards Bettman).

115. Katie Carrera, *Jason Chimera: ‘I Don’t Trust Gary Bettman Right Now’*, *WASH. POST* (Jan. 3, 2013), available at <http://www.washingtonpost.com/blogs/capitals-insider/wp/2013/01/03/jason-chimera-i-dont-trust-gary-bettman-right-now/>.

116. Adrian Dater, *Why I Don’t Think There Will Be an NHL Season*, *DENVER POST* (Sep. 29, 2012), available at <http://blogs.denverpost.com/avs/2012/09/29/nhl-season/11655/>.

117. *Id.*

118. *Id.*

119. Christopher Botta, *In His Third Lockout, Bettman Maneuvers With Owners’ Backing*, *SPORTSBUSINESS JOURNAL* (Oct. 29, 2012), <http://www.sportsbusinessdaily.com/Journal/Issues/2012/10/29/Leagues-and-Governing-Bodies/Bettman.aspx>.

120. SportsNet Staff, *Ovechkin Blasts NHL, Threatens to Stay in KHL*, *SPORTSNET* (Oct. 20, 2012, 9:21 PM), [http://www.sportsnet.ca/hockey/nhl-lockout/2012/10/20/alex\\_ovechkin\\_nhl\\_lock-out\\_khl/](http://www.sportsnet.ca/hockey/nhl-lockout/2012/10/20/alex_ovechkin_nhl_lock-out_khl/).

121. *Id.*

tensions.<sup>122</sup> Gary Bettman is not going anywhere anytime soon, and any attempt by the players to force Bettman out of the League will be unsuccessful. Therefore, the only solution is amending the collective bargaining process in a way that would diminish Bettman's power.

## 2. Donald Fehr

While the players are unwilling to work with Bettman, the recent appointment of Donald Fehr as the Executive Director of the NHLPA poses the risk of the owners developing similar hostility towards the NHLPA. While previous negotiations have been "owner-friendly," Donald Fehr is unlikely to make the negotiating mistakes that previous NHLPA Executive Directors were accustomed to making.<sup>123</sup> The negotiation process of the 2012–2013 lockout provided evidence that Fehr's presence has caused more complication than in years past.<sup>124</sup> In November 2012, after spending four days in extensive negotiations in New York City, the NHL and the NHLPA remained far apart on reaching a new Collective Bargaining Agreement.<sup>125</sup> At the conclusion of the meetings in New York City, the NHL blamed Fehr for misrepresenting the league's proposals to the players.<sup>126</sup> Fehr insisted that the NHL's accusations were inaccurate, and the players continued to support Fehr.<sup>127</sup> After the four days of negotiations concluded, Bettman stated he would be willing to stay in New York to continue negotiations, but Bettman's frustrations with Fehr and the NHLPA led him to question whether doing so would have any effect.<sup>128</sup>

While the NHL suggested Fehr is the problem, Fehr was just as quick to blame the owners.<sup>129</sup> While talking to media about the lockout, Fehr stated that "[t]his is a lockout they decided to have, this was a lockout of choice. There was no reason for it. Negotiations could still be ongoing . . . if there's a problem here, maybe someone ought to look in the mirror over there."<sup>130</sup> In addition, when faced with proposals from the owners, Fehr frequently asked "what's in it for the

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122. *Id.*; see also Pierre LeBrun, *Gary Bettman Locked in for Long Term*, ESPN (Mar. 11, 2011, 2:01 PM), <http://sports.espn.go.com/nhl/news/story?id=6206543>.

123. Kobritz, *supra* note 22, at 215.

124. Pat Leonard, *Talks Turn Ugly as NHL Fumes at Fehr*, DAILY NEWS (Nov. 10, 2012), available at <http://www.nydailynews.com/sports/hockey/talks-turn-ugly-nhl-fumes-fehr-article-1.1199867?localLinksEnabled=false>.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. See Leonard, *supra* note 124.



players?”<sup>131</sup> The collective bargaining process needs a change that would mitigate the roles of Fehr and Bettman, while also encouraging the parties to work with one another, rather than blame the other side.

### 3. *Unwillingness to Embrace the Presence of a Mediator*

In addition to their inability to work together, Fehr and Bettman have shown they are unwilling to allow a mediator to get involved at the early stages of a lockout. The use of a federal mediator in order to facilitate negotiations during the initial stages of the 2012–2013 lockout was considered.<sup>132</sup> Donald Fehr reportedly discussed the possibility with NHL commissioner Gary Bettman.<sup>133</sup> However, Bill Daly pointed out that “[a] mediator can only be helpful if both sides are willing to embrace it and compromise.”<sup>134</sup> Daly added that he “didn’t think that the introduction of a mediator into the process was timely or that it would necessarily further the process.”<sup>135</sup> Donald Fehr added that the NHLPA would be “averse” to the presence of a mediator in the negotiating process.<sup>136</sup>

Experienced mediator Arthur Boyland was willing to become involved in the process in November 2012,<sup>137</sup> but Fehr and Bettman resisted the presence of any mediator until January 2013.<sup>138</sup> Arthur Boyland is a U.S. Magistrate Judge who ultimately helped resolve the 2011 National Football League collective bargaining dispute.<sup>139</sup> Boyland was eager to get involved and stated, “I’d volunteer to do it for free . . . I’d love to get this thing done.”<sup>140</sup> The fact that the parties were able to reach an agreement relatively quickly after a mediator got involved in January suggests that a mediator may have been able

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131. Jason Brough, *Columnist: Players Fighting Bettman More Than Anything*, NBC SPORTS: PROHOCKEYTALK, (Oct. 1, 2012, 3:45 PM), <http://m.nbcsports.com/content/columnist-players-fighting-bettman-more-anything>.

132. See Strang, *supra* note 67.

133. *Id.*

134. *Id.*

135. Ryan Dadoun, *Will the NHL, Union Seek a Federal Mediator Soon?*, NBC SPORTS: PROHOCKEYTALK (Nov. 13, 2012, 10:00 AM), <http://prohockeytalk.nbcsports.com/2012/11/13/will-the-nhl-union-seek-a-federal-mediator-soon/>.

136. See Strang, *supra* note 67.

137. Mike Halford, *Former NFL Labor Mediator on NHL Lockout: “I’d Volunteer To Do It For Free”*, NBC SPORTS: PROHOCKEYTALK (Nov. 15, 2012, 11:35 AM), <http://prohockeytalk.nbcsports.com/2012/11/15/former-nfl-labor-mediator-on-nhl-lockout-id-volunteer-to-do-it-for-free/> (discussing how Boyland “helped bridge the gap” between the parties in the NFL collective bargaining process).

138. See Leonard, *supra* note 71.

139. See Halford, *supra* note 137.

140. *Id.*

to help reach an agreement as early as November. Instead, Fehr and Bettman chose to continue to fight it out between themselves, rather than embracing the help that mediators can provide. As a result, an agreement was not reached until January, after 625 games had been lost.<sup>141</sup>

It is obvious that the collective bargaining process must be amended. Why should the players and owners allow Bettman and Fehr to continue to be uncooperative with each another? The role of both Fehr and Bettman is to represent the interests of the players and owners. However, the tension caused by the presence of the two has drastically impacted the well being of both parties. If the players and owners implemented mandatory binding arbitration, the roles of Bettman and Fehr would be mitigated because a third party would have the authority to resolve the dispute if the two are unable to do so themselves. Rather than Bettman and Fehr continuing to offer insignificant and unrealistic counter-proposals that lead to lockouts and lost revenues, the two parties would be encouraged to work with one another and lockouts would forever be prevented.

### *B. Why Binding Arbitration Must Be Implemented*

The players and owners must find a way to regain control over the NHL's collective bargaining process; mandatory binding arbitration is the answer. A collective bargaining process that requires mandatory binding arbitration would provide an incentive for Bettman and Fehr to engage in a good-faith negotiation process, rather than continuing to point fingers at one another. This Section discusses why binding arbitration, rather than non-binding arbitration, is needed. The Section then discusses how mandatory binding arbitration cures collective bargaining issues. Finally, a proposal for how mandatory binding arbitration could be implemented is offered.

#### *1. Why Binding Arbitration, Rather than Non-Binding Arbitration, Is Needed*

The implementation of non-binding arbitration would not have the effect that binding arbitration would. The problem with the NHL's collective bargaining process is that Bettman and Fehr are not willing to participate in the kind of give-and-take negotiation process that is necessary to quickly resolve a dispute. A non-binding arbitration provision would fail to resolve this issue.

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141. See Bloomberg, *supra* note 74.

One positive of a non-binding arbitration award in other contexts is that it can help the parties forecast what a judge might conclude in resolving their dispute, thus allowing the parties to take that prediction into consideration during the negotiation process.<sup>142</sup> However, since the players and owners are not forced to litigate their dispute in front of a judge, a non-binding arbitration provision would serve no practical purpose in the NHL collective bargaining process. Rather than using the non-binding arbitration award as a negotiating tool, the parties will simply ignore it because the chance of a third party ever resolving their dispute is not guaranteed.

Further, should a non-binding arbitration provision be taken into effect, not only will the parties not use it as a negotiating tool, but there is no reasonable indication that the parties would agree to be bound by the award. Whichever side is unhappy with the arbitrator's decision could simply refuse to abide by it. Because the parties would have no incentive to cooperate in good faith, the non-binding arbitration process would prove to be ineffective. A non-binding arbitration proceeding would be no different than the parties volunteering to use a mediator which, as discussed above, the parties already have the ability to do. The NHL needs to take the next step and implement mandatory binding arbitration.

## 2. *How Mandatory Binding Arbitration Fixes the NHL's Collective Bargaining Problems*

A mandatory binding arbitration provision would mitigate the roles of Bettman and Fehr, while also providing them with an incentive to work with one another, thus making the collective bargaining process more efficient. As articulated above, the current collective bargaining process is not subject to arbitration, and as a result, Bettman and Fehr have no incentive to negotiate in good faith.<sup>143</sup> Implementing mandatory binding arbitration is how the players and owners can mitigate the roles of Bettman and Fehr and take back control of the collective bargaining process. Bettman and Fehr would no longer be able to exchange insignificant counter-proposals and blame the other party. Rather, they would have to work with one another in good faith in order to avoid an arbitrator resolving the dispute on his or her own. This process allows Bettman and Fehr to still serve as the representative of the players and owners, but would reduce the authority they have and ensure a much more efficient collective bargaining pro-

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142. See Bennett, *supra* note 94.

143. See Murphy, *supra* note 55.

cess. Ultimately, lockouts would be prevented and the NHL's existence and potential for growth would no longer be threatened by the inability of two lone individuals to work with one another.

### 3. *Obstacles to the Implementation of Mandatory Binding Arbitration*

While using mandatory binding arbitration in the NHL collective bargaining process is possible, many details would need to be worked out before the parties would agree to include the process. One major obstacle in implementing mandatory binding arbitration is that the parties must negotiate and determine exactly how the arbitration process would work. Naturally, each side will want to draft the provision in a way that would be favorable to them.<sup>144</sup> Because a mandatory binding arbitration provision ultimately leaves the dispute up to the arbitrator, the main issues the parties will need to determine ahead of time will be who pays for the costs of the arbitrator and who the arbitrator will be.

How the parties would decide to pay for the presence of an arbitrator is difficult to forecast. The presence of an arbitrator would not be overly expensive, and a 50-50 split would certainly be reasonable. The process of selecting an arbitrator is a little easier to suggest, given the precedent established by Major League Baseball (MLB). In MLB, a panel of arbitrators can be agreed to and selected by both parties.<sup>145</sup> If the two parties are unable to jointly agree to a panel by a certain date, the American Arbitration Association provides one for them.<sup>146</sup>

Given the current conflict and unwillingness to cooperate with one another, it is unrealistic to suggest that Bettman and Fehr can agree on anything, much less a panel of arbitrators which will determine the outcome of their disputes. Finding an outside party to provide an arbitration panel, such as the American Arbitration Association, is more realistic. Further, it would be most beneficial to the parties, in order to eliminate costs and expenses, for only one arbitrator to be selected from the panel that is provided for them. Allowing one person to have the authority to resolve the collective bargaining issues, rather than a panel that determines the outcome together, would also provide a further incentive for the parties to make sure they reach an

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144. See Baumann, *supra* note 1.

145. David J. Faurot & Stephen McAllister, *Salary Arbitrations and Pre-Arbitration Negotiation in Major League Baseball*, 45 INDUS. & LAB. REL. REV. 697, 699-700 (1992) (discussing the "final offer" arbitration process, as well as arbitrator authority, and how arbitrators are selected).

146. *Id.*

agreement on their own before the fate of the Collective Bargaining Agreement comes down to the decision of merely one arbitrator.

After agreeing on how the arbitrator is paid and selected, the parties then must draft a mandatory binding arbitration provision that would provide the technical details of how the procedure would work. One way of implementing mandatory binding arbitration would be similar to MLB's "final offer" arbitration system, which is used to settle player salary disputes.<sup>147</sup> In MLB "final offer" arbitration, each side submits an offer to the arbitrator, and the arbitrator conducts a hearing where the parties explain their positions, and are allowed to rebut the other party's position.<sup>148</sup> Typically the parties are able to reach a settlement before the arbitrator renders his or her award, but if no settlement is reached, the arbitrator delivers a final decision, choosing one of the two proposals for the player's salary.<sup>149</sup> MLB's final offer salary arbitration system has had the effect of facilitating negotiations between players and their respective teams.<sup>150</sup> It is therefore likely that a mandatory binding arbitration provision in the NHL Collective Bargaining Agreement would have the same results.

It is also conceivable that the presence of a mandatory binding arbitration provision in the collective bargaining process would provide enough incentive for the parties to reach an agreement on their own, before an arbitrator ever becomes involved. Since an arbitrator renders a final decision in the event that the parties cannot resolve the dispute,<sup>151</sup> the parties will not only negotiate in good faith, but they will try as hard as possible to reach a deal on their own. MLB's use of "final offer" arbitration has had this exact effect.<sup>152</sup> Thus, in addition to potentially resolving the disputes between the players and owners, the mandatory binding provision is likely to motivate Bettman and Fehr to reach an agreement before a mandatory binding arbitration process even begins. Either way, future NHL lockouts would be entirely avoided.

#### 4. *Procedural Proposal*

There are numerous possibilities regarding how the mandatory binding arbitration process would work procedurally. One possibility

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147. *Id.* at 697.

148. *Id.* at 698-99.

149. *Id.* at 697.

150. *Id.* at 701.

151. See Dennis R. Nolan & Roger I. Abrams, *The Labor Arbitrator's Several Roles*, 44 MD. L. REV. 873, 874-76 (1985) (discussing how the arbitrator may act as a mediator, agreement maker, contract reader, and judge).

152. See Faurot, *supra* note 145.

is to insert a provision directly into the Collective Bargaining Agreement that subjects the parties to arbitration in the event that a collective bargaining agreement expires without a new agreement ready to take its place.

The procedural details are flexible, and would be negotiated by the players and owners ahead of time. One possibility is, in the event that the parties do not reach an agreement, a hearing in front of an arbitrator would be set five days after the expiration of the Collective Bargaining Agreement. The hearing would be conducted much like an ordinary negotiating meeting, and its primary purpose would be to allow the arbitrator to gain familiarity with the parties and the disputed issues. The hearing also would provide the parties with another opportunity to hear one another's positions and possibly allow the parties to reach an agreement before arbitration takes place.

An arbitration date would then be set five days after the hearing. This period would allow the parties to strategically come up with their proposals on all disputed issues and provide a final opportunity for the parties to reach an agreement on their own. Each side would submit its proposal to the arbitrator at least forty-eight hours before the scheduled arbitration date. During arbitration, each party would have sixty minutes to orally present their proposals to the arbitrator, and then each side would have an additional thirty minutes to rebut any arguments made by the other side.

The arbitrator would be given an additional forty-eight hours to determine which one of the two proposals he or she finds most appropriate, rather than attempt to establish a middle-ground, just like MLB's "final offer" salary arbitration procedure.<sup>153</sup> The arbitrator would then award a judgment declaring which one of the proposals is to be taken into effect. The parties are then forced to sign and abide by the agreement.

Using the NHL Collective Bargaining Agreement that expired on September 15, 2012 as an example, the course of events can be outlined as follows. Since the agreement expired without a new one ready to take its place, the parties would have been forced to attend a negotiation session, with the presence of an arbitrator, on September 20. If the parties failed to reach an agreement by September 25, an arbitration meeting would have been held. The arbitrator's award, which would be the Collective Bargaining Agreement, would have taken effect on September 27, 2012. Because a new collective bargaining agreement would have been guaranteed by the time NHL reg-

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153. *Id.*

ular season games begin in early October, the start of the season would have never been in jeopardy. As a result, no games would have been cancelled.

Mandatory binding arbitration would solve the NHL collective bargaining process's inefficiencies. Bettman and Fehr would be forced to work together and resolve the dispute, or else an arbitrator would simply do it for them. No longer would Bettman and Fehr have the ability to delay negotiations and allow work stoppages to continue to occur. Why should the players and owners continue to allow Bettman and Fehr to fight over small issues at the cost of billions of dollars? If the NHL players and owners agreed to include mandatory binding arbitration into the collective bargaining process, Bettman and Fehr would more adequately represent their interests by preventing both the players and owners from continuing to lose money as a result of cancelled games.

### III. IMPACT

The NHL must implement mandatory binding arbitration into its collective bargaining process. The three lockouts that the NHL has experienced during Gary Bettman's tenure as Commissioner of the NHL have had severe impacts on the players, owners, and the League as a whole. Lockouts simply cannot continue and mandatory binding arbitration is the answer. This Section argues that the League must implement mandatory binding arbitration by explaining how the NHL as a whole, as well as the livelihoods of players and third parties, is severely at risk if the NHL fails to implement mandatory binding arbitration.

#### *A. Impact of Lockouts on the Operation of the National Hockey League*

Sacrificing billions of dollars in revenue from the cancellation of games due to ongoing collective bargaining disputes is not a pattern the League can afford to continue. Due to the increase in revenue, the players and owners are even more at risk than they were during the 2004–2005 lockout.<sup>154</sup> NHL Deputy Commissioner Bill Daly estimated that as a result of cancelling the 2012–2013 preseason alone, the NHL incurred “\$100 million in damages to the business that’s not going to be recouped.”<sup>155</sup> As of October 27, 2012, 365 total games had

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154. See Jeglic, *supra* note 1.

155. See Strang, *supra* note 67.

been cancelled, which was estimated to cost the League \$720 million.<sup>156</sup>

Lockouts have the potential of deterring passionate and loyal fans from supporting the League.<sup>157</sup> The NHL was able to recover and increase revenues after the 2004–2005 lockout for various reasons. The emergence of two young superstars, Sidney Crosby and Alexander Ovechkin, as well as the addition of the Winter Classic, helped generate new excitement.<sup>158</sup> However, the League cannot count on such innovative changes in the future in order to regenerate excitement after lockouts.

The cancellation of the 2012–2013 Winter Classic alone could have drastic effects on the NHL's relationship with its fans and potential for revenue growth.<sup>159</sup> An estimated \$15 million in revenue was lost as a result of the event's cancellation.<sup>160</sup> Further, the popularity of the Winter Classic is on par with the popularity of the Stanley Cup Finals, even though the Winter Classic is just another regular season game.<sup>161</sup> David Carter, the Executive director of the University of Southern California's Sports Business Institute stated, "[b]y cancelling the game, both hard-core and casual fans will revisit their interest and future spending on the game. This . . . affects the rest of the industry because the more disenfranchised fans become the longer it will take the NHL to rebuild its fan bases."<sup>162</sup>

An increase in fan knowledge and awareness of collective bargaining issues poses the threat of many fans no longer supporting the League if lockouts continue.<sup>163</sup> As the 2012–2013 lockout concluded, NHL executives began acknowledging bringing fans back would be "a

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156. Sam Carchidi, *NHL Cancels November Schedule Because of Lockout*, PHILLY.COM (Oct. 27, 2012), available at [http://articles.philly.com/2012-10-27/sports/34765494\\_1\\_winter-classic-division-rivals-six-times-owners-claim](http://articles.philly.com/2012-10-27/sports/34765494_1_winter-classic-division-rivals-six-times-owners-claim).

157. Terry Davidson, *Fans' Love Affair With NHL on the Rocks*, SUN NEWS (Dec. 10, 2012), available at <http://www.sunnewsnetwork.ca/sunnews/sports/archives/2012/12/20121210-190206.html>

158. Erin Ford Cozens, *"The World's Greatest Fans": The State of the 2012 NHL Lockout*, CENTER FOR THE STUDY OF SPORTS AND LEISURE IN SOCIETY (Dec. 11, 2012), <http://csslsblog.org/2012/12/11/the-worlds-greatest-fans-the-state-of-the-2012-nhl-lockout/>.

159. David Shoalts, *NHL Could Shoot Itself in the Foot by Cancelling the Winter Classic*, GLOBE AND MAIL (Oct. 31, 2012, 12:02 AM), <http://www.theglobeandmail.com/sports/hockey/nhl-could-shoot-itself-in-the-foot-by-cancelling-winter-classic/article4787726/>.

160. *Id.*

161. *Id.*

162. *Id.*

163. See Cozens, *supra* note 158 (attributing the increase in fan knowledge, frustrations, and anger the use of social media).



battle.”<sup>164</sup> One Canadian report taken while the 2012–2013 lockout was underway confirmed this proposition.<sup>165</sup> A recent poll indicated that seventy-six percent of Canadians identify themselves as hockey fans.<sup>166</sup> Almost half of those fans said that “they would be less likely to attend a game as a result of the [2012–2013] lockout.”<sup>167</sup> An employee of the company that conducted the survey added that “[t]here is a sizable group of fans who are so mad at what’s happened, and these are people who probably love the sport. They are just so frustrated and upset . . . there may be consequences for the league that are long term after this, because it’s the second lockout in a short period of time and this one has gone on longer.”<sup>168</sup>

While NHL executives may have acknowledged that bringing back fans would be “a battle,” the League appears unwilling to make any effort to regain fan support.<sup>169</sup> Rather than taking steps in order to repair the relationship the League has with its passionate fan base, at the conclusion of the 2012–2013 lockout, many NHL franchises decided to raise ticket prices, providing yet another incentive for fans to boycott the league.<sup>170</sup> Perhaps this is one way for many teams to recover lost revenue resulting from the lockout, but how can the NHL expect to regain fan support when after cancelling months of games, the League asks for fans to pay more money for tickets than ever before?

In addition to losing fan support, the NHL also faces the risk of losing crucial sponsors.<sup>171</sup> McDonald’s, for example, intended to be one of the NHL’s primary sponsors for marketing the Winter Classic, All-Star game, and other events.<sup>172</sup> However, once the lockout began, McDonald’s signed a two-year deal with the NFL instead.<sup>173</sup> Further, Brian Cooper, president of S&E Sponsorship Group, estimated that

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164. Scott Burnside, *The Lockout and the Damage Done*, ESPN (Jan. 6, 2013, 8:45 PM), [http://espn.go.com/nhl/story/\\_id/8817964/nhl-lockout-but-damage-done-irreparable](http://espn.go.com/nhl/story/_id/8817964/nhl-lockout-but-damage-done-irreparable) (quoting an NHL executive who stated, “[w]e have a lot of goodwill to make up. People are really disappointed in us. We need some real good things to give them cause to come back in the arena.”).

165. See Davidson, *supra* note 157.

166. *Id.*

167. *Id.*

168. *Id.*

169. See Burnside, *supra* note 164.

170. Jon Greenberg, *NHL Raises Ticket Prices*, ESPN (Feb. 14, 2013, 1:06 PM), [http://espn.go.com/nhl/story/\\_id/8945052/nhl-ticket-price-hike-surpasses-other-leagues](http://espn.go.com/nhl/story/_id/8945052/nhl-ticket-price-hike-surpasses-other-leagues) (stating after the 2012–2013 lockout, the NHL raised ticket prices at a higher rate than the MLB, NFL, and NBA for the second consecutive year).

171. See Burnside, *supra* note 164.

172. *Id.*

173. *Id.*

the Winter Classic has roughly \$3-million in corporate sponsorships.<sup>174</sup> David Carter added, “[sponsors] have other avenues to reach consumers and you can bet they are determining how best to retrench.”<sup>175</sup> It is hard to imagine sponsors continuing to commit millions of dollars to a League that allows its signature regular season event to be cancelled.

Lockouts also pose a serious risk in impeding momentum the League has gained in non-traditional hockey markets, such as Los Angeles and Florida.<sup>176</sup> Following the Los Angeles Kings’ Stanley Cup title in 2011–2012, the Kings sold an “unprecedented” amount of tickets for the 2012–2013 season.<sup>177</sup> However, the Kings may have a hard time regaining fan interest in a crowded Los Angeles sports market that includes the Lakers, Clippers, Dodgers, and Galaxy, all of whom have enjoyed recent success and attention.<sup>178</sup> In addition, the Florida Panthers won the Southeast Division for the first time in franchise history in 2011–2012 and ticket sales were the highest they had been in seven years.<sup>179</sup> Each lockout makes it more challenging for these franchises to win back the attention of their fans.

### B. Impact of Lockouts on Players

In addition to the billions of dollars in revenue that is lost as a result of lockouts, the livelihoods of the players are severely impacted. Following the 1994–1995 season, two of Canada’s eight NHL franchises relocated to cities in the United States, as a result of decreased fan support following the lockout, causing players to move to another country.<sup>180</sup> Further, because NHL players are not paid during lockouts, many players turn to professional hockey leagues in other countries in order to make money.<sup>181</sup> However, not all NHL players are able to do so.<sup>182</sup> Lockouts force some players, such as Phoenix Coyotes forward Paul Bissonnette, to ponder how they will make a

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174. See Shoalts, *supra* note 159.

175. *Id.*

176. Mike Halford, *So . . . Will the Fans Come Back?*, NBC SPORTS: PROHOCKEYTALK (Jan. 6, 2013, 3:23 PM), <http://prohockeytalk.nbcsports.com/2013/01/06/so-will-the-fans-come-back/>.

177. *Id.*

178. *Id.*

179. *Id.*

180. See Horowitz, *supra* note 52.

181. Jeff Z. Klein, *As N.H.L. Lockout Begins, So Does a Likely Exodus of Players to Europe*, N.Y. TIMES (Sep. 16, 2012), available at [http://www.nytimes.com/2012/09/17/sports/hockey/nhl-lockout-comes-as-some-players-go-to-skate-in-european-leagues.html?\\_r=0](http://www.nytimes.com/2012/09/17/sports/hockey/nhl-lockout-comes-as-some-players-go-to-skate-in-european-leagues.html?_r=0).

182. Jason Gregor, *Inactivity During Lockout a Bane For Most NHL Goalies*, EDMONTON JOURNAL (Nov. 11, 2012), available at <http://www.edmontonjournal.com/sports/Inactivity+during+lockout+bane+most+goalies/7532916/story.html>.

living if and when they are no longer able to make a living playing in the NHL.<sup>183</sup> In addition, the inactivity of players during the lockout is likely to negatively impact their on-ice performance once games resume.<sup>184</sup>

Players that do find other playing jobs typically sign contracts with European teams that allow the players to return to the NHL as soon as a new collective bargaining agreement is reached.<sup>185</sup> In doing so, players must leave their families behind, live in unfamiliar places for an indefinite period of time, and, in most cases, make much less money than they would in the NHL.<sup>186</sup>

While some NHL players are able to find work in Europe, other NHL players are forced to retire.<sup>187</sup> After the 2004–2005 lockout, many prominent NHL players never played another game.<sup>188</sup> This list includes Scott Stevens, Mark Messier, Ron Francis, and Adam Oates.<sup>189</sup> While every player loses the ability to play another season, such prolific NHL players are denied one final “farewell” season.<sup>190</sup> Minor league hockey player Stephen Gionta noted “Scott Stevens . . . never played another game after the last lockout and that’s unfortunate because he was such an instrumental guy in the league. He didn’t get the right sendoff in his career.”<sup>191</sup> Star players who might have retired if the 2012–2013 lockout resulted in the cancellation of the entire season include Teemu Selanne and Jaromir Jagr.<sup>192</sup> As a result of these issues, the players themselves, in addition to the NHL as a whole, have an incentive to implement mandatory binding arbitration in order to prevent lockouts.

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183. Joe Yerdon, *Lockout Provides Biz Nasty With Reality Check*, NBC SPORTS: PROHOCKEYTALK (Nov. 14, 2012, 6:15 PM), <http://prohockeytalk.nbcsports.com/2012/11/14/lockout-provides-biz-nasty-with-a-reality-check/> (discussing the reality check that “fringe” NHL players are experiencing as a result of the threat of a lengthy lockout effecting their ability to make a living playing in the NHL).

184. *Id.*

185. See Klein, *supra* note 181.

186. *Id.*

187. Rich Chere, *NHL Lockout: If Season Lost, Some Players’ NHL Careers Will Be Over*, NJ.COM (Dec. 11, 2012, 2:29 PM), [http://www.nj.com/devils/index.ssf/2012/12/nhl\\_lockout\\_season\\_needs\\_to\\_be.html](http://www.nj.com/devils/index.ssf/2012/12/nhl_lockout_season_needs_to_be.html).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

*C. Impact of Lockouts on Third Parties*

While players and owners are adversely impacted by ongoing lockouts, the NHL should also take notice of the effect lockouts have on third parties. Businesses located around NHL arenas that rely on games being played in order to attract customers lose a significant amount of revenue when games are not played.<sup>193</sup> These businesses include sports paraphernalia vendors, bars, restaurants, and companies that advertise through NHL franchises.<sup>194</sup>

The city of Boston provides a perfect example of the negative impact lockouts can have on third parties. Boston Bruins home games generate significant revenue to local businesses located outside of the arena.<sup>195</sup> Each Boston Bruins home game is estimated to be worth up to \$1 million in revenue to local businesses.<sup>196</sup> Restaurants located near the arena in Pittsburgh are no different. Restaurant owner Dave Sypherd stated that Penguins games account for seventy percent of his restaurant's business.<sup>197</sup> When explaining the impact the 2004–2005 lockout had on his business, Sypherd stated, "I am still paying for it now."<sup>198</sup> Another Pittsburgh restaurant owner added, "there are definitely other victims to this besides the players and the owners."<sup>199</sup> Businesses in Canada are adversely affected as well.<sup>200</sup> NHL memorabilia shop manager Santana Enrique was "suffering" as a result of the 2012–2013 lockout.<sup>201</sup> Enrique stated "it's worthless without the Canadiens and no hockey . . . People have stopped buying NHL gear."<sup>202</sup>

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193. See Ryan Dadoun, *NHL Memorabilia Shop Manager "Suffering" Because of Lockout*, NBC SPORTS: PROHOCKEYTALK (Oct. 13, 2012, 8:10 PM), <http://prohockeytalk.nbcsports.com/2012/10/13/nhl-memorabilia-shop-manager-suffering-because-of-lockout/>; see also James Brooks, *An NHL Lockout Could Hurt Bruins-Based Business Far Beyond the Garden*, BOSTON BUSINESS JOURNAL (Sept. 10, 2012, 3:08 PM), [http://www.bizjournals.com/boston/blog/bottom\\_line/2012/09/boston-bruins-nhl-lockout.html?page=all](http://www.bizjournals.com/boston/blog/bottom_line/2012/09/boston-bruins-nhl-lockout.html?page=all) (discussing how businesses located around the Boston Garden are economically impacted by the NHL lockout).

194. See Dadoun, *supra* note 193.

195. See Brooks, *supra* note 193.

196. *Id.*

197. Mark Belko, *NHL Lockout is Bad News for Businesses Near Consol*, PITTSBURGH POST-GAZETTE (Oct. 5, 2012), available at <http://www.post-gazette.com/stories/local/neighborhoods-city/nhl-lockout-is-bad-news-for-businesses-near-consol-656250/>.

198. *Id.*

199. *Id.*

200. See Dadoun, *supra* note 193.

201. *Id.*

202. *Id.*

While business owners suffer from the NHL's work stoppages, many NHL employees have lost their jobs altogether.<sup>203</sup> The Florida Panthers and Ottawa Senators both publically announced layoffs as a result of the 2012–2013 lockout.<sup>204</sup> Many other NHL teams stated that while they did not currently plan on making staff adjustments as a result of the lockout, some hinted that changes could have occurred if the lockout continued.<sup>205</sup>

During the early stages of the 2012–2013 lockout, U.S. senators took notice of the drastic effects NHL lockouts have on third parties.<sup>206</sup> In an attempt to facilitate the negotiation process, New Jersey U.S. Senators Frank Lautenberg and Robert Menendez sent a letter to Gary Bettman and Donald Fehr, which expressed many of these economic concerns.<sup>207</sup> The letter states, among other things, that “[a] delayed or canceled regular season would be a major setback for Newark, [New Jersey]. It could mean millions of dollars in lost economic activity, and more people out of work when [New Jersey’s] state unemployment rate is already at a 30-year high.”<sup>208</sup> In an attempt to provide further incentive for the parties to come to an agreement, the letter also argues that the Senate has jurisdiction over the issue.<sup>209</sup> However, the attempts of the senators had no impact, as the NHL began cancelling regular season games soon after the existence of the letter was reported.<sup>210</sup>

Businesses survive on their ability to retain customers, maintain professional relationships with employees, and help facilitate the economy and well being of outsiders around them. The NHL is no different. The League simply cannot continue to endure one lockout after another and expect to receive the support and attention the NHL needs in order to survive. Therefore, the players and owners must agree to implement mandatory binding arbitration into the collective bargaining process in order to prevent future lockouts. In doing so, the NHL would preserve the relationships it relies on in order

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203. Tim Reynolds, *Panthers Announce Layoffs, Blame “Work Stoppage”*, YAHOO! SPORTS (Sep. 18, 2012, 5:08 PM), <http://bigstory.ap.org/article/panthers-lay-employees-blame-work-stoppage> (explaining recent staff adjustments taken by the Florida Panthers as a result of the 2012 lockout).

204. *Id.*

205. *Id.*

206. John Brennan, *NJ Senators to NHL: End the Lockout*, RECORD (Oct. 1, 2012, 1:45 PM), <http://blog.northjersey.com/meadowlandsmatters/3685/nj-senators-to-nhl-end-the-lockout/>.

207. *Id.*

208. *Id.*

209. *Id.*

210. See Carchidi, *supra* note 156.

to continue to be one of the most successful sports leagues in North America.

#### IV. CONCLUSION

The NHL cannot allow unnecessary and lengthy collective bargaining disputes to continue to infringe upon the operation of the League. The NHL's unprecedented amount of collective bargaining disputes demonstrates that the collective bargaining process must be amended. Mandatory binding arbitration is the answer.

Mandatory binding arbitration would facilitate communication between Gary Bettman and Donald Fehr, who appear entirely unwilling to cooperate with one another. Rather than refusing to negotiate, mandatory binding arbitration forces the parties to either reach an agreement on their own, or allow their dispute to be determined by a neutral third party arbitrator. Either way, future lockouts would be entirely avoided. It is time league owners and players realize the severe consequences lockouts have and implement mandatory binding arbitration in order to preserve the integrity, growth, and existence of the National Hockey League.

